

The Washington Post

AN INDEPENDENT NEWSPAPER

TUESDAY, JUNE 20, 1972

PAGE A18

The Court and Electronic Surveillances

The decision by the Supreme Court yesterday that the Federal Government cannot constitutionally use electronic surveillance devices in domestic security cases unless it gets judicial permission to do so is a landmark in the long struggle to maintain individual freedom in this country. The effect of it—if the Executive Branch complies with it, and we trust that will happen—should be to reduce substantially the near-paranoiac fears among some citizens that their conversations are being tapped or bugged by the government. Beyond this, the decision is a sharp slap at the Nixon Administration which had baldly attempted to justify as a legitimate exercise in presidential power a practice that had begun years ago and grown steadily more dangerous.

This decision, as far as we can tell, will have no substantial impact on the Executive Branch's legitimate efforts to gain information about those who would engage in acts of political espionage or terrorism. It simply requires the Department of Justice to handle its investigations into those areas as it already handles its investigations into other kinds of crime. What it does rule out is the procedure ardently advocated by this administration under which the Attorney General alone determined when wiretapping and eavesdropping equipment was to be used in domestic security cases. In the future, a judge is to make that determination under traditional standards of the Fourth Amendment. This rule, it should be noted, has not yet been extended to cover investigations into subversive activities by other governments.

It should be said that the procedure defended by the Nixon Administration in this case did not originate with it; what this administration did was give it a much more explicit rationale. For at least 25 years, the Department of Justice through the FBI has carried out electronic surveillance in domestic security cases without court approval. Lying behind these efforts to protect the domestic peace, at least in the beginning, were fears of Communist subversion and espionage. More lately, the fears have expanded to include other kinds of domestic unrest and the phrase "domestic security" seems to have grown in meaning to encompass many kinds of strong dissent against the status quo. The Court

seems to have recognized this. In a powerful opinion by Justice Powell, it said:

History abundantly documents the tendency of government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the government attempts to act under so vague a concept as the power to protect "domestic security."

Underlying the Court's decision was an explicit rejection of the key argument which the Nixon Administration had used in claiming the right to broad surveillance power. That claim was that the President could not fully discharge his constitutional duty to protect domestic security unless his agents were free to engage in whatever wiretapping and eavesdropping the Attorney General might authorize. To this, Justice Powell replied, "We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment."

The Justice turned aside each of the arguments the government had made to support that assertion—that this kind of surveillance was primarily intelligence gathering, not law enforcement, that domestic security matters are too complex for courts to evaluate, and that secrecy would be compromised by requiring warrants in advance. The last two points were brushed aside and to the other, Justice Powell noted that security surveillances are particularly sensitive because, among other things, of "the temptation to utilize such surveillances to oversee political dissent."

Perhaps the most important effect of this decision will come outside of government. The idea that the government is always listening has become widespread in some areas of our society and has something to do, we think, with some of the bitterness loose in the land. Adherence to the spirit of this decision, or whatever minor modifications Congress might be able to make in it, by the Executive Branch would remove one of the grievances which is helping to increase the alienation of some citizens from their government.